

COA No. 42827-0-II

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

WASHINGTON STATE LIQUOR CONTROL BOARD,

Appellant,

v.

DUBLIN DOWN, LLC,

Respondent,

and

TOP SHELF, LLC,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
2012 MAY 16 AM 11:59
STATE OF WASHINGTON
BY DEPUTY

RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

Respondents Dublin Down, LLC ("Dublin Down"), and Top Shelf, LLC ("Top Shelf") (collectively "Licensees") file this reply brief.

Appellant Washington State Liquor Control Board (the "Board") is collaterally estopped by the criminal action against Licensees' employees from relitigating the issue determinative of both the criminal action and the subject administrative action: whether the Board's use of minor investigative aides in a controlled purchase program on premises posted off-limits to minors is unlawful because the Board has not adopted a rule allowing its Enforcement Division to do so, requiring suppression of all evidence obtained through the compliance check. The Board and the State are the same party. Collateral estoppel can be applied against the State in administrative actions. Applying collateral estoppel based on the criminal action does not deprive the Board of jurisdiction. The Board, through the Clark County Prosecutor's Office prosecuted the criminal action against the Licensee's employees. The employees were acting as Licensees' agents and were in direct privity with Licensees. There is, therefore, mutuality of both parties in the criminal and administrative actions. The Board had ample opportunity to litigate this issue in the criminal action.

The issue was fully litigated and decided against the Board. Under the doctrine of collateral estoppel, the Board is precluded from relitigating this issue in the subject administrative proceeding.

This issue was correctly decided in the criminal action. While the Board has broad powers to enforce the penal provisions of the Liquor Act, the Board is an administrative agency and the Liquor Act consistently requires that the Board exercise its power through administrative rules and regulations. The Liquor Act only generally authorizes the Board to enforce its penal provisions through Enforcement Officers. RCW 66.44.290(1) does give the Board specific authority to adopt rules allowing the use of minors in a controlled purchase program, but the Board has only adopted rules allowing this in the context of in-house controlled purchase programs conducted by liquor licensees. Use of a minor investigative aide by Enforcement Officers in their compliance checks was, therefore, unlawful. The only effective remedy for these unlawful compliance checks is to suppress all evidence obtained through them.

Therefore, this Court should set aside the Board's Final Orders and order that it dismiss the administrative complaints against Licensees.

II. ARGUMENT

A. Collateral Estoppel Applies to Preclude the Board from Relitigating the Issue of Whether the Compliance Checks Were Lawful.

The Board preliminarily argues, citing to *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 418 P.2d 424 (1966), that collateral estoppel somehow does not apply to administrative proceedings involving the Board. But the decision in *Jow Sin Quan* does not even mention the term collateral estoppel. Rather, the Court framed the issue before it as follows:

“Thus, the basic question remaining for determination in the instant case is whether the board in processing the complaint in issue proceeded in a fundamentally fair, honest, and deliberative manner within the scope of its constitutional and statutory power.” *Jow Sin Quan*, 69 Wn.2d at 379.

The *Jow Sin Quan* Court concluded that the Board was acting within the scope of its authority and that there was substantial, relevant and competent evidence to support the Board’s findings. *Jow Sin Quan*, 69 Wn.2d at 380-81. It was only after doing so that the Court turned to the licensee’s contention that “the action of the board was arbitrary, capricious and/or unreasonable” because an acquittal of two criminal charges and the dismissal of the third “constituted a bar to the instant administrative

proceedings against the licensee”. *Jow Sin Quan*, 69 Wn.2d at 382. The Court did not address this issue under the collateral estoppel doctrine. Instead, the Court addressed the issue in terms of whether the Board was deprived of jurisdiction by acquittal of the licensee in a criminal proceedings, concluding it was not. *Jow Sin Quan*, 69 Wn.2d at 382-83.

In the present case, Licensees do not contend that the Board was deprived of its jurisdiction by the criminal proceedings. Licensees’ position is that the Board, through the Clark County Prosecutor’s Office, had a full and fair opportunity to litigate its case in the criminal action and that, under the doctrine of collateral estoppel, it is now estopped from relitigating the issue of whether the compliance check was lawful in this administrative proceeding.

Application of this doctrine no more deprives the Board of its jurisdiction than collateral estoppel deprives any other tribunal, whether a court or an administrative agency, of its jurisdiction because the parties have already litigated an issue in a prior action. Collateral estoppel does not deprive the second tribunal of jurisdiction, it only “prevents a second litigation of issues between the parties even though a different claim or cause of action is asserted.” *Christensen v. Grant County Hospital Dist.*

No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004)(citing to *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)).

Collateral estoppel applies precisely because the Board exercised its jurisdiction to prosecute criminal actions against Licensees' employees.

All four elements of this doctrine are established in the present case.

1. The Issue Raised in this Administrative Proceeding, Whether the Compliance Checks Were Unlawful, Is the Same as the Issue Decided in the Criminal Action.

The Board relies primarily on *Lemond v. State Dept. of Licensing*, 143 Wn.App. 797, 180 P.3d 829 (2008), in arguing that the issue decided in the criminal case against Licensees' employees was not identical with the issue presented in this administrative proceeding. But as the Court of Appeals in *Lemond* noted at the outset of its decision, the order of the municipal court the plaintiff sought to use as a basis for collateral estoppel in that case was very brief and offered no explanation as to the reasoning behind the decision:

“The municipal court, reciting that it, 'having considered briefing and having heard argument made by both parties, and finding good cause and legal grounds,' entered an order suppressing the BAC test results in the criminal action because 'the prosecution is unable to rate a foundation for the admission of the test result into evidence.'” *Lemond*, 143 Wn.App. at 800.

But in the criminal case involved in the subject action, after considering both oral and documentary evidence, the District Court made 13 specific findings of fact. Among these were findings that Enforcement officers attempted to operate a controlled purchase operation using a minor investigative aide, that Licensees' establishments are bars with signs prohibiting minors from being on the premises, that despite these signs a minor investigative aide entered onto the premises, that the Board has not adopted rules allowing for a controlled purchase program under RCW 66.44.290(1), except for rules applying to private controlled purchase programs, and that Enforcement's attempt to use a minor investigative aide resulted in violations of several criminal statutes. (AR 64-66.) Based on these findings, the District Court entered three legal conclusions, that the controlled purchase program was not authorized by statute, that all evidence gathered against Licensees' employees should be suppressed, and that all three criminal cases against them should be dismissed with prejudice. (AR 66.)

In the criminal appeal, the Superior Court specifically noted that the District Court had concluded that the compliance checks conducted by the Enforcement Officers using a minor investigative aide were unlawful

and based on this finding suppressed the evidence gathered during the compliance checks. (AR 201.) The Superior Court also noted that the District Court had further found that the conduct of the Enforcement Officers amounted to misconduct pursuant to CrRLJ 8.3(b). (AR 201.) The Superior Court affirmed all of these findings and conclusions, except the finding that there was misconduct pursuant to CrRLJ 8.3(b). (AR 200.) At the end of a three page Memorandum Opinion, the Superior Court provided the following explanation as to why it was affirming the District Court's decision to suppress all evidence from the compliance checks and dismiss the criminal cases, despite not affirming the finding of misconduct under CrRLJ 8.3(b):

“This court upholds the decision of the trial court to grant the motion to suppress evidence. Based upon this decision, State would be unable to utilize the evidence regarding defendants serving the minor aide, would presumably result in dismissal of the case. However, the trial court also found the enforcement actions constituted misconduct under CrRLJ 8.3(b). With the additional information of authorization under Policy #87, this court concludes the investigation by the Enforcement Division of the WSLCB utilizing a minor aide falls short of the standard of ‘governmental conduct which would warrant dismissal pursuant to CrRLJ 8.3(b).’ (AR 202.)

The issue decided in the criminal case is identical to the issue presented in this administrative case and, as the Superior Court specifically found, resolution of this issue does not require resort to a criminal rule not applicable in this administrative proceeding. The issue in both cases is whether compliance checks by Enforcement Officers using a minor investigative aide to enter into premises posted off-limits to minors without authority of a rule adopted by the Board are unlawful, requiring suppression of all evidence obtained through the compliance check. In the criminal case, both the District Court and the Superior Court concluded that the compliance checks were unlawful and that all evidence obtained through them should be suppressed.. Without this evidence, dismissal is the only remedy available, because no evidence remains to support the criminal complaint against Licensees' employees or the administrative complaint against Licensees.

2. Collateral Estoppel Is Properly Applied in the Subject Administrative Proceedings.

The Board cites *State v. Mullin-Coston*, 152 Wn.2d 107, 95 P.3d 321 (2004), for the proposition that nonmutual collateral estoppel is not available in criminal matters. But the holding of *Mullin-Coston* is limited to two separate criminal proceedings involving two different defendants

and does not apply to preclude the application of this doctrine in the subject case.

In *Mullin-Coston*, the defendant was charged with first-degree murder. In an earlier trial, his friend was convicted of second-degree murder for his role in the death. The jury in that case concluded that the friend was not guilty of premeditation. The defendant in *Mullin-Coston* then moved to dismiss the first degree murder charge against him on the grounds of collateral estoppel. The Washington State Supreme Court granted review “to resolve the issue of whether the doctrine of nonmutual collateral estoppel can apply in cases like this one, where preclusion would be based on a prior jury verdict from the trial of a separate defendant.” *Mullin-Coston*, 152 Wn.2d at 112. The Court resolve this issue by holding that “the doctrine of nonmutual collateral estoppel does not apply in criminal cases where the basis for asserting preclusion is a jury verdict in the case of a separate defendant.” *Mullin-Coston*, 152 Wn.2d at 112.

The holding in *Mullin-Coston* clearly does not apply to preclude the application of collateral estoppel in the present case. This case does not involve an attempt to apply the doctrine of collateral estoppel in a later criminal case based on a verdict in an earlier criminal case.

The Board argues, citing *United States v. Mendoza*, 464 U.S. 154, 162, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), that collateral estoppel should not apply because the party against whom it is asserted is the government. However, this again is too broad a reading of the holding in *Mendoza*. In *Mendoza*, the U.S. District Court and the Ninth Circuit Court of Appeals both held that the government was collaterally estopped from litigating the constitutional issue of whether the government's administration of the Nationality Act denied him due process of law because of an earlier decision against the government in cases involving other individuals. It was in this context that the Court held that "the United States may not be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party." *Mendoza*, 464 U.S. at 155.

More fundamentally, the instant case is not a case of nonmutual collateral estoppel. The parties involved in the prior criminal action were not the employees of other bars charged as a result of compliance checks by Enforcement Officers using minor investigative aides. They were Licensees' own employees and the compliance checks that resulted in the criminal action against them are the same compliance checks that resulted in the administrative action against Licensees.

Collateral estoppel may be invoked against an individual who was not a party to the prior action, so long as he was in privity with a party to that prior action. Privity is generally used to describe a mutual relationship to the same right. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn.App. 289, 306, 103 P.3d 1265 (2005). As Licensees' employees, the defendants in the prior criminal actions were clearly in privity with Licensees. Thus, sufficient mutuality exists to assert collateral estoppel against Licensees based on the prior criminal action. By the same token, sufficient mutuality exists for Licensees to assert collateral estoppel based on the prior criminal action.

3. Applying Collateral Estoppel Will Not Work an Injustice.

The Board finally argues that collateral estoppel should not be applied for policy reasons. The Board argues that the underlying purpose of the administrative proceeding, which the Board describes as determining whether Licensees are guilty of violating the conditions of their license by selling liquor to an underage individual, is somehow different from the underlying purpose of the criminal proceedings against Licensees' employees, which was to determine whether Licensees' employees are guilty of violating a criminal statute as a result of the same

sale of liquor to the same individual. But as explained in *Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 796-97, 982 P.2d 601 (1999), applying collateral estoppel is not unjust where it is based on the suppression of evidence after a full evidentiary hearing:

“In the present case, the Department argues application of collateral estoppel would be unjust for policy reasons. The Department contends because ‘the purposes of the driver's license proceeding are separate and distinct from those supporting criminal prosecution,’ and because a ‘criminal proceeding has no bearing on the civil driver's license proceeding,’ the suppression ruling in the district court criminal proceeding should not have collateral estoppel effect in the subsequent administrative proceeding. Supplemental Br. of Resp't at 11-13. While it may be true the result of the criminal trial ought to have no bearing on the outcome of the license disqualification proceedings, it does not follow that a fully litigated and contested evidentiary ruling in the criminal trial ought not to have preclusive effect in a subsequent administrative proceeding, especially where, as in the present case, the same law as to admissibility applies.”

The Board does not dispute that it was a party to the prior criminal action against Licensees' employees. That prior criminal action involved the identical issue involved in the subject action, namely whether the compliance check that resulted in the State seeking sanctions against Licensees and their employees was unlawful, requiring suppression of all evidence obtained through it. The Board had ample opportunity to litigate that issue in the criminal action. There is no policy reason why collateral

estoppel should not be applied to the decision in the criminal action that evidence obtained through the compliance checks should be suppressed, because the checks were unlawful.

B. Enforcement Does Not Have Authority to Conduct Compliance Checks Using Minor Investigative Aides on Premises Posted Off-limits to Minors, Because the Board Has Never Adopted a Rule Allowing it to Do So and Doing So Subjects the Minor Investigative Aide to Criminal Sanctions.

Title 66, the Washington State Liquor Act, is an exercise of the police powers of the State and is to be liberally construed to protect the welfare and safety of the people of the State. RCW 66.08.010. Under RCW 66.08.020, the Board has the authority to administer Title 66 RCW.

RCW 66.44.290 addresses the use of minors in controlled purchase programs so as the compliance check that gives rise to the subject administrative proceeding. This statute provides that:

“(1) Every person under the age of twenty-one years who purchases or attempts to purchase liquor shall be guilty of a violation of this title. This section does not apply to persons between the ages of eighteen and twenty-one years who are participating in a controlled purchase program authorized by the liquor control board under rules adopted by the board. Violations occurring under a private, controlled purchase program authorized by the liquor control board may not be used for criminal or administrative prosecution.

“(2) An employer who conducts an in-house controlled purchase program authorized under this section shall provide his or her employees a written description of the employer's in-house controlled purchase program. The written description must include notice of actions an employer may take as a consequence of an employee's failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase.

“(3) An in-house controlled purchase program authorized under this section shall be for the purposes of employee training and employer self-compliance checks. An employer may not terminate an employee solely for a first-time failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase program authorized under this section.

“(4) Every person between the ages of eighteen and twenty, inclusive, who is convicted of a violation of this section is guilty of a misdemeanor punishable as provided by RCW 9A.20.021, except that a minimum fine of two hundred fifty dollars shall be imposed and any sentence requiring community restitution shall require not fewer than twenty-five hours of community restitution.” [Emphasis added.]

In determine the meaning of a statute, a Washington Court first looks to the language of the statute. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). If that language is not ambiguous, the Court must give effect to its plain meaning. *Id.* A statute is ambiguous only if it is subject to two or more reasonable interpretations. *Id.* If a statute is unambiguous, a Court will give it effect in accordance with its plain language, without adding language to it, even though the Court may

believe that the Legislature intended something other than what is expressed in the language of the statute. *Id.* But in applying plain language analysis, the Court may look to not only what the Legislature says in the particular statute being analyzed, but also to what the Legislature has said in related in related statutes. *Cerrillo*, 158 Wn.2d at 202.

While the Board has broad powers under the Liquor Act, the Legislature has provided several statutory guidelines defining the authority of the Board and to safeguard against arbitrary administrative action and abuse of its discretionary power. *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455, 458-59, 722 P.2d 808 (1986). One of these statutes is RCW 66.08.030, which describes the power of the Board to make regulations under Chapter 34.05 RCW, Washington's Administrative Procedure Act. This statute lists 20 different subject matter areas of the Board's power to make regulations. Among these, the Board has the power to make regulations: "Prescribing the duties of the employees of the board, and regulating their conduct in the discharge of their duties." RCW 66.08.030(1). RCW 66.98.070 then extends the

Board's power to make regulations beyond the 20 subject matter areas listed in RCW 66.08.030:

“For the purpose of carrying into effect the provisions of this act, the board shall have the same power to make regulations not inconsistent with the spirit of this act as is provided by RCW 66.08.030.”

Construing the Liquor Act as a whole, while the Legislature unquestionably gives the Board broad powers under the Act, the Legislature clearly intended that the Board exercise those powers as an administrative agency through regulations adopted pursuant to the requirements of Washington's Administrative Procedure Act.

The only statute generally authorizing the Board to employ agents to enforce the penal provisions of the Liquor Act is RCW 66.44.010(4), which provides that:

“The Board may appoint and employ, assign to duty and fix the compensation of, officers to be designated as liquor enforcement officers. Such liquor enforcement officer shall have the power, under the supervision of the board, to enforce the penal provisions of this title and the penal laws of this state relating to the manufacture, importation, transportation, possession, distribution and sale of liquor, and the provisions of chapters 82.24 and 82.26 RCW. They shall have the power to arrest without a warrant any person or persons found in the act of violating any of the penal provisions of this title or of any penal law of this state relating to the manufacture, importation, transportation, possession, distribution and sale of liquor, and the provisions of chapters 82.24 and 82.26 RCW.”

While this statute gives the Board the power to appoint Enforcement Officers with police power to enforce the penal provisions of the Act, this statute does not give the Board the power to appoint and employ minor investigative aides.

RCW 66.44.290(1) does specifically grant the Board the authority to adopt a rule allowing for the use of minors in controlled purchase programs. The language of RCW 66.44.290(1) does not make any distinction between controlled purchase programs conducted by the Board through its Enforcement Division and controlled purchase programs conducted in-house by licensee employers. While other language of RCW 66.44.290 does speak to in-house controlled purchase programs, none of this language is addressed to the requirement that controlled purchase programs must be authorized by rules adopted by the Board. The Board does not dispute that under the authority of RCW 66.44.290(1), it adopted the regulations contained in WAC Chapter 314-21, or that these are the only rules formerly adopted by the Board concerning the use of minors in controlled purchase programs. But the three regulations contained in this chapter, WAC 314-21-005, WAC 314-21-055, and WAC 314-21-055, all

only address an in-house controlled purchase program conducted by a licensee employer.

The Board unquestionably has the power to authorize its Enforcement Division to use minor investigative aides in controlled purchase compliance checks under RCW 66.44.290(1). But under the plain language of this statute read in the context of the Liquor Act as a whole, the Board as an administrative agency was required to exercise this power by formally adopting a rule allowing its Enforcement Division to do so. The Board has not adopted such a rule. Without such a rule, Enforcement did not have legal authority to employ minor investigative aides in a controlled purchase program and the compliance checks giving rise to these administrative proceedings were unlawful.

C. Because Enforcement's Compliance Checks Were Unlawful, this Court Should Set Aside the Board's Final Orders Finding Licensees Violated RCW 66.44.270 and WAC 314-11-020(1), and Dismiss the Administrative Complaints Against Licensees.

RCW 34.05.570 provides:

"(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

“(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

“(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

“(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure”.

RCW 34.05.574(1) then provides that:

“(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. * * *”

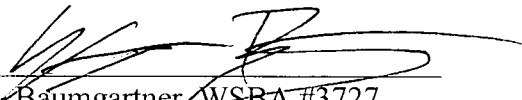
The Board acted outside of its statutory authority and engaged in an unlawful procedure by conducting a controlled purchase program using minor investigative aides without formally adopting a rule allowing its Enforcement Division to do so as required by RCW 66.44.290(1). This Court should, therefore, set aside the Board’s Final Orders finding violations of RCW 66.44.270 and WAC 314-11-020(1).

III. CONCLUSION

For the foregoing reasons, Licensees respectfully request that the Court set aside the Final Orders of the Board and dismiss the administrative complaints against Licensees. This action does not undermine the Board's authority to enforce the Liquor Act. It only requires the Board to exercise that authority through the administrative rule making process, as required by that Act.

Respectfully submitted this 14 day of May, 2012.

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COA No. 42827-0-II

COURT OF APPEALS,
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WASHINGTON STATE LIQUOR)	
CONTROL BOARD,)	
)	CERTIFICATE
Appellant,)	OF SERVICE
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v.)	
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DUBLIN DOWN, LLC,)	
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and)	
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TOP SHELF, LLC,)	
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DIVISION II
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STATE OF WASHINGTON
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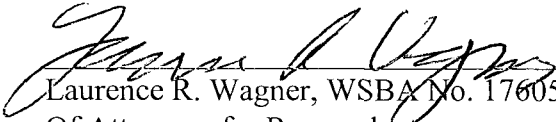
I, Laurence R. Wagner, make the following declaration:

1. I am over the age of 18, a resident of Clark County,
Washington, and not a party to the above action.
2. On May 14, 2012, I caused to be served a true and correct
copy of Respondents' Reply Brief and this Certificate of Service via U.S.
mail to:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 14th day of May, 2012, in Vancouver, Washington.


Laurence R. Wagner, WSBA No. 17605
Of Attorneys for Respondents